No. 83-572

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLOYD C. BALDWIN, *et al.*,
Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Hamilton
Counsel of Record
Robert L. Deitz
Susan Cobb
Ginsburg, Feldman and Bress,
Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners
(other counsel listed on inside cover)

October 13, 1983

Other Counsel for Petitioners:

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, NC 27106

Attorney for Petitioners Baldwin and Brewer, *et al.*

F. Lee Weaver
Weaver & Bennett, PA
P.O. Box B-925
Matthews, NC 28105

Attorney for Petitioners Raintree Homeowners Association, Inc., et al.

Hugh G. Casey, Jr.
Casey & Bishop, PA
700 Law Building
Charlotte, NC 28202

Attorney for Petitioners Derrick, *et al.*

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment prohibit arbitrary actions by municipalities in annexing territory?

2. Does the due process clause continue to require judicial review by state courts of constitutional challenges to state action?

PARTIES

Four cases were consolidated for review in the Court of Appeals. Petitioners -- appellants and cross-appellees in the Court below -- are

Floyd C. Baldwin, Ruby S. Baldwin, William Edward Kirby, Jr., Brenda Head Kirby, Richard B. Charles, Frances S. Charles, Raymond E. Wigley and Dorothy Wigley;

W.E. Derrick, Carl L. Gaile, R.R. Lee and D.M. Randall;

Henry Brewer, Robert M. Burcham, Philip Demarko, Joy M. McNab, Gladys Norman, Sam Pope, James A. Sneed and Cornelius F. Spach;

Raintree Homeowners Association, Inc., Louis Capots, John Geis, Charles Herbert Green, Robert D. Kinniburgh, Jr. and Kenneth Smelter.

Respondents -- appellees and cross-appellants in the Court below -- are

City of Winston-Salem, N.C., Mayor Wayne A. Corpening, Vivian H. Burke, Marilyn S. Harpe, Larry D. Little, Virginia K. Newell, Robert S. Northington, Jr., Ernestine Wilson, Larry W. Womble and Martha S. Wood, City of Charlotte, Eddie Knox, Mayor, David L. Berryhill, Charlie Dannelly, Laura Frech, Harvy B. Gantt, Ron Leeper, Ralph McMillan, Pamela G. Patterson, Edwin Peacock, Jr., George K. Selden, Jr., Herbert Spaugh, Jr. and Minnette C. Trosch.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

FLOYD C. BALDWIN, et al.,

Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Petitioners Floyd C. Baldwin, et al., respectfully petition this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of tne Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, in the case of Baldwin v. City of

Winston-Salem, N.C., 710 F.2d 132 (1983).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 710 F.2d 132 and is set forth as Appendix A. The opinion of the District Court in Baldwin v. City of Winston Salem is reported at 544 F. Supp. 123 (W.D.N.C. 1982) and is attached as Appendix B. The opinion of the District Court in Raintree Homeowners Association v. City of Charlotte and Carlisle v. City of Charlotte is reported at 543 F. Supp. 625 (W.D.N.C. 1982) and is attached as Appendix C. The opinion of the District Court in Brewer v. City of Winston-Salem is unreported and is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered June 15, 1983. On petitioners' timely motion filed August 23, 1983, this Court extended the time within which to file a petition for writ of certiorari to October 13, 1983. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions are pertinent to this case: section 1 of the Fourteenth Amendment to the U.S. Constitution, set forth in Appendix E; N.C. Gen. Stat. § 160A-50, set forth in Appendix F.

STATEMENT OF THE CASE

This case, a consolidation of four cases challenging annexations by Winston-Salem and Charlotte, North Carolina, concerns the limits that the due process clause of the Fourteenth Amendment places on municipal annexations.

Under North Carolina law, municipalities are authorized to extend their municipal corporate limits by annexation of contiguous areas. N.C. Gen. Stat. § 160A-48. State law defines the permissible nature of such annexations, and establishes administrative procedures to be employed by the municipalities. Judicial review of annexations is "limited," as the Fourth Circuit conceded. App. A, 9a.

Appellate review is statutorily restricted to a determination of whether statutory procedures relating to notice and hearing have been met; whether the annexing city has properly prepared a report that includes maps of the territory to be annexed and plans for the provision of municipal services; and whether the territory to be annexed is urban in nature under the very flexible criteria established by the statute. N.C. Gen. Stat. § 160A-50, App. F, 1f; see N.C. Gen. Stat. §§ 160A-47, 160A-48. The reviewing court may not separately and independently determine whether municipal conduct in annexing territory is arbitrary, capricious, or unreasonable, or in any other respect unconstitutional.

The North Carolina Supreme Court has held that judicial review "is limited by statute." In re Annexation Ordinance, 303 N.C. 220, 229, 278 S.E.2d 224, 230 (1981). The reviewing court may "determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes." 303 N.C. at 229, 278 S.E.2d at 230 (emphasis added). Thus, no "separate test of 'reasonableness' [is found] within the limited scope of judicial review permitted in annexation cases." 303 N.C. at 230, 278 S.E.2d at 231. Accord, Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

This case began with four separate lawsuits: Baldwin, et al., v. City of Winston-Salem, et al., and Brewer, et

al. v. City of Winston-Salem et al., which challenged several different annexations in Winston-Salem, N.C.; Raintree Homeowner's Association, et al. v. City of Charlotte, et al., and Carlisle, et al., v. City of Charlotte, et al., which challenged two different annexations in Charlotte, N.C.[1/] The facts relevant to this petition may be summarized briefly.

Each case involved a two-prong challenge under the Fourteenth Amendment. First, petitioners alleged in their complaints that the annexations at issue were arbitrary, capricious, and unreasonable in violation of federal due process. Second, petitioners alleged

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1/ The annexations challenged in the Brewer and Raintree cases are not yet consummated.

that the North Carolina annexation statute on its face and as applied violates due process by prohibiting judicial review of significant constitutional questions, including whether an annexation is arbitrary, capricious, and unreasonable.

Petitioners pleaded with particularity the arbitrary nature of the four annexations. Specifically, they claimed that the boundaries of the areas to be annexed were gerrymandered to include well-to-do neighborhoods and to exclude poor areas, in one instance creating a virtual hole in a city; or to include farmland or a business entity that would provide tax revenue without requiring municipal services; or to exclude areas that needed municipal services; or to include neighborhoods that already had

services superior to those offered by the cities simply to gain additional tax revenues. Petitioners also claimed that the proposed annexation boundaries arbitrarily divided established communities; or that the annexations excluded neighborhoods close to the annexing cities while arbitrarily including more distant neighborhoods; or, in one instance, that an annexation took in property that, if it belonged in any municipality, belonged in another one. In sum, petitioners claimed that the annexations in major part made no geographic or historic sense, would yield inferior municipal services to the annexed territories, and were designed simply to obtain increased municipal revenues at the least possible cost. These allegations demonstrated the arbitrary, and

hence unconstitutional, nature of the annexations.

In each case, the district court dismissed the complaint. Relying on Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), the courts held that "challenges to annexations generally are not actionable under the Fourteenth Amendment." App. B, 4b; see App. C, 20c-21c; App. D, 3d. In no case did the district court decide whether the annexations actually were arbitrary and unreasonable.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed in a per curiam decision. The Court began by observing that the "creation and redrawing of the political subdivisions of a state . . . are peculiarly matters involving state political

concerns." App. A, 11a (footnote omitted). Indeed, the Court of Appeals continued, the "Supreme Court early in this century flatly stated that 'annexation by a city or town is purely a state political matter, entirely within the power of the state legislature to regulate.'" App. A, 11a, quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). Although the Fourth Circuit recognized that annexations that discriminate against black citizens, Gomillion v. Lightfoot, 364 U.S. 339 (1964), diminish the right to vote, Hayward v. Clay, 573 F.2d 187, 190 (4th Cir. 1978), or in some other way burden "fundamental" interests may implicate the Fourteenth or Fifteenth Amendments, it ruled that annexations generally are outside the purview of

federal constitutional interest. App. A, 12a-15a. Specifically, the Court ruled that "there is no right under the Fourteenth Amendment to challenge annexation decisions alleged merely to be arbitrary and capricious." App. A, 16a, n.3.

Because the Fourth Circuit held that annexations do not implicate due process concerns, it also concluded that "there is no federal right to have state courts hear challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law." App. A 16a, n.3.

REASONS FOR GRANTING THE WRIT

Introduction

The lower courts that considered petitioners' Fourteenth Amendment claims felt bound to follow the broad dictum contained in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907): that the municipal annexation process raises no Fourteenth Amendment concerns. Although the decision in Hunter was narrow, its broader implications have been followed from time to time by various federal courts. See, e.g., Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978). Recently in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978), this Court, while recognizing that the broad assertions in Hunter have been "qualified" by later cases, stated that Hunter "continues to have

substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." Thus, because of Hunter, petitioners' well-pleaded claims of arbitrariness have never been heard on their merits.

This Court should firmly hold that the due process clause of the Fourteenth Amendment applies to the annexation process and prohibits arbitrary state conduct. When Hunter was decided in 1907, the Fourteenth Amendment was fewer than forty years old. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which roundly rejected the applicability of the Bill of Rights to the states through the Fourteenth Amendment, dominated constitutional

jurisprudence. Indeed, only one provision of the Bill of Rights had been "incorporated" under the Fourteenth Amendment when Hunter disclaimed any federal interest in municipal annexations. The modern expansive reading of the due process clause had not yet taken hold.

Part A begins by briefly setting forth the development of Fourteenth Amendment law. That historical review will demonstrate that the legal principles informing Hunter have long since been overruled and that, as a consequence, Hunter itself has lost much of its precedential force. Part A will conclude by showing that petitioners' allegations of arbitrary state conduct constitute a federal cause of action under well-established Fourteenth Amendment case law.

Part B shows that North Carolina's failure to provide judicial review for constitutional challenges to municipal conduct violates almost half-a-century of settled Fourteenth Amendment law.

A. Arbitrary State Conduct Violates The Fourteenth Amendment

The Court of Appeals held that petitioners' allegations of arbitrary state conduct failed to state a cause of action because annexations are "peculiarly matters involving state political concerns," App. A, 11a, and generally immune from Fourteenth Amendment scrutiny. The express basis for the Court's decision was Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). Although Hunter actually adjudicated a very narrow question -- whether citizens of one municipality may by their vote alone defeat annexation by another

municipality -- its broadly phrased ratio decidendi tended to suggest that all decisions relating to municipal boundaries are beyond the reach of the Fourteenth Amendment. Thus, the Hunter Court held that a state may, among other things, alter the boundaries of a municipality "conditionally or unconditionally, with or without the consent of the citizens, or even against their protest." 207 U.S. at 179.

Hunter's narrow reading of the Fourteenth Amendment followed the established precedents of its day, for when Hunter was decided in 1907 the due process clause placed few restrictions on state conduct of any sort. Indeed, the gradual process of "incorporating" the Bill of Rights was not to begin for another twenty years. Prior to passage

of the Fourteenth Amendment, it was settled law that the Bill of Rights did not restrain state action. In 1833, Chief Justice Marshall held that "[t]hese Amendments contain no expression indicating an intention to apply them to the State governments," Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a view that the Court reaffirmed on other occasions. See, e.g., Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847).

Ratification of the Fourteenth Amendment did not immediately upset this settled doctrine. In the Supreme Court's first interpretation of the Civil War Amendments in the

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), Justice Miller rejected the argument that the Fourteenth Amendment was intended to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people...." 83 U.S. (16 Wall.) at 78. Noting that the "one pervading purpose" underlying the Civil War Amendments was the "freedom of the slave race," 83 U.S. (16 Wall.) at 71, the Court rejected the idea that the Fourteenth Amendment had a content beyond the problems that gave rise to it. See generally C. Fairman, Reconstruction and Reunion, 1864-88 (Part One) (6 History of the Supreme Court of the United States) at 1260-1300; G. Gunther, Constitutional Law (1975 ed.) at 486-505.

Over the next twenty years, the Supreme Court consistently rebuffed attempts to read the Fourteenth Amendment more expansively. In a variety of contexts,2/ the Court held that neither the privileges and immunities clause nor the due process clause was a limitation against state encroachment on personal freedoms. See, e.g., Pressler v. Illinois, 116 U.S. 252 (1886) (right

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2/ Five years after the Slaughter-House Cases were decided, Justice Miller expressed his surprise that counsel continued to advocate positions seemingly foreclosed by that case. "[T]he docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment." Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

to keep and bear arms neither a privilege and immunity nor a liberty); United States v. Cruikshank, 92 U.S. 542 (1875) (right to peaceable assembly not a privilege and immunity); O'Neil v. Vermont, 144 U.S. 323 (1892) (right to be free from cruel and unusual punishment not a privilege and immunity); Brown v. New Jersey, 175 U.S. 172 (1899) (right to jury trial not a part of due process); Twining v. New Jersey, 211 U.S. 78 (1908) (right against self-incrimination not within due process clause). But see Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (recognizing Fourteenth Amendment right to compensation for property taken by state). See generally Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366

(1911); Warren, The New "Liberty" Under The Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926).

The initial shift in due process analysis came with this Court's decision in Allgeyer v. Louisiana, 165 U.S. 578 (1897). In the first of the so-called substantive due process decisions, the Court held that a Louisiana statute concerning property insurance violated liberty of contract under the Fourteenth Amendment. The Court invoked substantive due process analysis over the next 35 years to invalidate a host of state statutes. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (state labor law limiting the length of the work week held a violation of the Fourteenth Amendment); Coppage v. Kansas, 236 U.S. 1 (1915) (law protecting labor

organizing efforts held unconstitutional).

Despite a willingness during the Lochner era to protect economic interests as a "liberty" under the Fourteenth Amendment, the Supreme Court continued to reject claims that the fundamental personal rights guaranteed against federal encroachment by the Bill of Rights were also guaranteed against state encroachment by the Fourteenth Amendment. Not until 1925, when the Court first held that free speech was a liberty under the Fourteenth Amendment, did the gradual process of "incorporation" and expansion of Fourteenth Amendment protections begin. Gitlow v. New York, 268 U.S. 652 (1925); accord, Fiske v. Kansas, 274 U.S. 380 (1927).

The historical inevitability of the Hunter decision is apparent from this brief review of the development of due process analysis. In 1907, when Hunter was decided, the Slaughter-House Cases continued to bar challenges to state laws abridging personal freedoms3/ -- at least those outside the economic realm. The process of incorporating into the Fourteenth Amendment the specific guarantees of the Bill of Rights was still eighteen years away. It is equally apparent, however, that Hunter -- or at least its broader dictum -- should have little continuing precedential force.

3/ Justice Moody, author of Hunter, also wrote the opinion for the Court in Twining v. New Jersey, 211 U.S. 78 (1908), which held that the privilege against self-incrimination is not guaranteed by the Fourteenth Amendment.

First, the intellectual antecedents of Hunter -- the Slaughter-House Cases and their progeny -- are clearly no longer law. Since 1925, the Supreme Court has held binding upon the states through the Fourteenth Amendment virtually all the provisions of the Bill of Rights. See Gitlow v. New York, 268 U.S. 652 (1925) (free speech, press, religion); Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unlawful searches); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); In re Oliver, 333 U.S. 257 (1948) (right to public trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to

confront opposing witnesses); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process). See generally Duncan v. Louisiana, 391 U.S. 145 (1968).

Even outside the specific protections afforded by the Bill of Rights, the due process clause now provides substantial constraints against state conduct that are inconsistent with the dictum in or the reasoning underlying Hunter. For example, the Fourteenth Amendment now requires the equal apportionment of votes among the citizens of a state, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964), and prohibits, absent a compelling state interest, burdens on the right to vote. Kramer v. Union Free School District, 395 U.S. 621 (1969).

It limits summary prejudgment remedies in civil litigation. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The Fourteenth Amendment requires a hearing for the denial of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), and, in some situations, for the failure to renew a contract of employment with the state. Perry v. Sindermann, 408 U.S. 593 (1972).

Second, the key principle of Hunter -- that the state "at its pleasure" may "expand or contract the territorial area" of a municipality, 207 U.S. at 178 -- is simply no longer true. For example, gerrymandering the boundaries of a city to disenfranchise black voters violates the Fifteenth Amendment. Gomillion v. Lightfoot, 364 U.S. 339 (1960); see Reynolds v. Sims, 377 U.S.

at 566 (discrimination in voting violates Fourteenth Amendment). But more generally, the notion that a municipality may take action against persons or property "at its pleasure" is abhorrent to the idea of due process.

No principle is more basic to constitutional government than the prohibition against arbitrary conduct by a state. At least as early as Hurtado v. California, 110 U.S. 516 (1884), this Court identified the fundamental inconsistency between arbitrariness and due process of law. "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." 110 U.S. at 536. In Slochower v. Board of Higher

Education of New York, the Court reaffirmed the importance of the "'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." 350 U.S. 551, 559 (1956) (quoting Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 (1937)). Accord, Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Certainly an annexation decided by lot or bribery, although at the state's "pleasure," would not comport with the due process clause.

Petitioners do not seek a ruling from this Court federalizing state annexation procedures. In some states, unlike North Carolina, see part B, infra, courts will entertain challenges

on constitutional grounds to the reasonableness of annexations. See, e.g., State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235 (1949); cf. 5 U.S.C. § 706(2)(A) (authorizing federal courts to strike down "arbitrary [and] capricious" agency action). A decision by this Court that due process prohibits arbitrary annexations will likely result in review by North Carolina courts of this constitutional issue. See Part B, infra.

Petitioners also do not seek a ruling that the conduct alleged in this case is unconstitutional. Whether the conduct alleged here is in fact arbitrary should later be decided by the district courts.4/ Petitioners seek

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4/ Conduct similar to that challenged in this case has been held arbi-

[Footnote continued]

only a narrow ruling that arbitrary and capricious conduct violates due process; that, contrary to Hunter, due process prohibits arbitrary action taken at the state's "pleasure."

The Court has already recognized that some of the "broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases. . . ." Holt Civic Club v. City of Tuscaloosa, 439 U.S. at 71 (citing Kramer v. Union Free School District, 395 U.S. 621 (1969)). The broader dictum of Hunter has thus become, in the words of Mr. Justice

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[Continued from previous page]

trary and unconstitutional by other courts. See, e.g., State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947).

Frankfurter, a "derelict on the waters of the law." Lambert v. California, 355 U.S. 225, 232 (dissenting opinion). This Court should now hold that due process principles regulate the process of municipal annexations and prevent arbitrary and capricious conduct.5/

B. The Due Process Clause Requires State Judicial Review of Constitutional Challenges to State Action

Under North Carolina law, judicial review of annexations is severely

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5/ Federal courts in circuits other than the Fourth have ruled that the Fourteenth Amendment prohibits arbitrary and capricious annexations. See, e.g., Doyle v. Municipal Commission of Minnesota, 340 F. Supp. 841, 844 (D. Minn.), aff'd, 468 F.2d 620 (8th Cir. 1972); Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1405 (D. Colo.), aff'd 399 U.S. 901 (1970). There is thus a division in the circuits that ought to be resolved.

limited. See N.C. Gen. Stat. § 160A-50; App. F, 1f. In an interpretation of state law that is binding on the federal courts, O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), the North Carolina Supreme Court has held that no "separate test of 'reasonableness' [is found] within the limited scope of judicial review permitted in annexation cases." In re Annexation Ordinance, 303 N.C. 220, 230, 278 S.E.2d 224, 231 (1981) (evidence showing arbitrary conduct not considered). Accord, Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

Because the Fourth Circuit in this case held that arbitrary and capricious annexations do not violate federal due

process, it also held that there is no federal constitutional right to have state courts hear challenges to arbitrary and capricious annexation decisions. App. A, 16a, n.3. This Court, however, should hold that the judicial review provision of the North Carolina annexation statute is unconstitutional both on its face and as applied in this case.

Part A outlined the changing imperatives of due process since ratification of the Fourteenth Amendment in 1868. One principle, however, has remained unchanged for almost a century: that due process requires judicial review of constitutional challenges to state conduct. In Chicago, M. & St. P. R. Co. v. Minnesota, 134 U.S. 418 (1890), a railroad challenged rates set

by a state commission, contending that they were unreasonably low and unequal. The state supreme court refused review on the ground that under state law the rates set by the commission were intended to be "final and conclusive." 134 U.S. at 456. On appeal, the Supreme Court reversed, holding that due process of law requires a judicial hearing on the railroad's constitutional challenge. "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." 134 U.S. at 458 (emphasis added). Accord, Wadley S.R. Co. v. Georgia, 235

U.S. 651, 660-61 (1915) (party affected by regulatory orders is "entitled, by the due process clause, to a judicial review . . . as to whether he has been thereby deprived of a right protected by the Constitution"); Missouri v. Chicago, B. & Q.R. Co., 241 U.S. 533, 537-38 (1915) (right to judicial review is "well-settled" principle).

This due process doctrine was reaffirmed in the leading case of Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). There a state utility commission, finding that a water company's rates were unreasonably high, reduced them. The Pennsylvania Supreme Court affirmed because the state statute made the commission's determinations conclusive. On appeal, the Supreme Court reversed on the ground that denial

of the opportunity for review of constitutional questions is itself a denial of due process of law. "[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289. Reversal was required because "[t]hus far [the water company] has not succeeded in obtaining the review . . . which the Fourteenth Amendment requires the State to provide." Id.

In St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49-54 (1936), which involved a Department of

Agriculture rate order, the Supreme Court recognized a similar Fifth Amendment due process right to judicial review of constitutional questions arising in federal administrative proceedings. In a well-known concurring passage, Justice Brandeis observed, "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84.6/ See 5

6/ The view expressed in Ben Avon and St. Joseph Stock Yards that, on appeals from administrative deci-

[Footnote continued]

U.S.C. § 706(2)(A) (authorizing federal courts to reverse "arbitrary [and] capricious" agency conduct).

The continuing vitality of this principle is shown by various decisions that have construed federal administrative statutes to allow judicial review in order to avoid the constitutional question that failure to provide review would raise.7/ For example, in Johnson

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[Continued from previous page]

sions, courts should review facts de novo has been criticized. See, e.g., Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 980-84 (1957). But cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982). However, the requirement that constitutional questions arising from state or federal administrative proceedings must be subjected to judicial review remains sound law.

7/ See Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an

[Footnote continued]

v. Robison, 415 U.S. 361 (1974), where the constitutionality of a veterans benefit statute was challenged, the Government contended that judicial review was barred by a provision purporting to render all administrative decisions final and unreviewable. Noting that a construction foreclosing constitutional challenges to the act would "raise serious questions concerning the constitutionality" of that statute, the Court read the statute to permit judicial review of such claims. 415 U.S. at 366. Accord, Califano v.

[Continued from previous page]

> act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Sanders, 430 U.S. 99, 109 (1977); Weinberger v. Salfi, 422 U.S. 749, 762 (1975).

Unlike the federal courts that have been able to construe federal statutes as permitting judicial review, this Court is unable through statutory construction to avoid the constitutional question. This Court should thus follow the path of Ben Avon and hold that, by denying judicial review of constitutional challenges to state conduct, the North Carolina annexation statute is unconstitutional.

CONCLUSION

For the reasons stated, this Court should grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert L. Deitz
Susan A. Cobb

GINSBURG, FELDMAN AND BRESS, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners

(Other counsel listed on next page)

October 13, 1983

Rosbon D. B. Whedbee
3307 Bonbrook Circle
Winston-Salem, N.C. 27106

Attorney for Petitioners Baldwin and Brewer, et al.

F. Lee Weaver
Weaver & Bennett, P.A.
P.O. Box B-925
Matthews, N.C. 28105

Attorney for Petitioners Raintree Homeowners Association, Inc., et al.

Hugh G. Casey, Jr.
Casey & Bishop, P.A.
700 Law Building
Charlotte, N.C. 28202

Attorney for Petitioners Derrick, et al.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1761

Floyd C. Baldwin; Ruby S. Baldwin; William Edward Kirby, Jr.; Brenda Head Kirby; Richard B. Charles; Frances S. Charles; Raymond E. Wigley and Dorothy Wigley,

Appellants,

v.

City of Winston-Salem, NC; Mayor Wayne A. Corpening; Vivian H. Burke; Marilyn S. Harpe; Larry D. Little; Virginia K. Newell; Robert S. Northington, Jr.; Ernestine Wilson; Larry W. Womble and Martha S. Wood,

Appellees.

No. 82-1767

Raintree
Homeowners Association,
Inc.; Louis Capots; John Geis;
Charles Herbert Green; Robert D.
Kinniburgh, Jr. and Kenneth Smelter,

Appellants,

v.

City of Charlotte; Eddie Knox,
Mayor; L. David Berryhill;
Charlie Dannelly; Laura Frech;
Harvy B. Gantt; Ron Leeher;
Ralph McMillan; Pamela G.
Patterson; Edwin Peacock, Jr.;
George K. Selden, Jr.; Herbert
Spaugh, Jr. and Minnette Trosch,

Appellees.

No. 82-1768

H.B. Carlisle; W. E. Derrick;
Carl L. Gaile; R. R. Lee and
D. M. Randall,

Appellants,

v.

City of Charlotte; Eddie Knox, Mayor; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeper; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette C. Trosch,

Appellees.

No. 82-1785

Raintree Homeowners Association, Inc.; Louis Capots; John Geis; Charles Herbert Green; Robert D. Kinniburgh, Jr. and Kenneth Smelter,

Appellees,

v.

City of Charlotte; Mayor Eddie Knox; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeher; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette Trosch,

Appellants.

No. 82-1786

H. B. Carlisle; W. E. Derrick; Carl L. Gaile; R. R. Lee and D. M. Randall,

Appellees,

v.

City of Charlotte; Mayor Eddie Knox; David L. Berryhill; Charlie Dannelly; Laura Frech; Harvy B. Gantt; Ron Leeper; Ralph McMillan; Pamela G. Patterson; Edwin Peacock, Jr.; George K. Selden, Jr.; Herbert Spaugh, Jr. and Minnette C. Trosch,

Appellants.

No. 82-2120

Henry Brewer; Robert M. Burcham; Philip Demarko; Joy M. McNab; Gladys Norman; Sam Pope; James A. Sneed and Cornelius F. Spach,

Appellants,

v.

City of Winston-Salem; Mayor Wayne A. Corpening; Vivian H. Burke; Marilyn S. Harpe; Larry D. Little; Virginia K. Newell; Robert S. Northington, Jr.; Ernestine Wilson; Larry W. Womble and Martha S. Wood,

Appellees.

82-1761 - Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, Chief Judge; 82-1767 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1768 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1785 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-1786 - Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge; 82-2120 - Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

Submitted April 4, 1983

Decided June 15, 1983

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and KELLAM,[1] Senior

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1/ Honorable Richard B. Kellam, Senior United States District Judge for

(Footnote cont'd on next page)

District Judge.

(James Hamilton, Robert L. Deitz, Susan A. Cobb, Ginsburg, Feldman, Weil and Bress, Chartered; Rosbon D.B. Whedbee; F. Lee Weaver, Weaver & Bennett, P.A.; Hugh G. Casey, Jr., Casey & Bishop, P.A. on brief) for Appellants; (Roddey M. Ligon, Jr., Womble, Caryl, Sandridge & Rice; Ronald G. Seeber, Ralph D. Karpinos; Henry W. Underhill, Jr., H. Michael Boyd on brief) for Appellees.

(Footnote cont'd)

the Eastern District of Virginia, sitting by designation.

PER CURIAM:

These consolidated cases present the single question of whether landowners who allege that their real property is to be annexed by a municipality in order to increase the municipality's tax base have stated a claim upon which relief can be granted under the due process clause of the Fourteenth Amendment. The district courts uniformly held that they have not. We affirm.

I.

Under North Carolina law, municipalities are authorized to extend their municipal corporate limits by annexation of contiguous real property. N.C. Gen. Stat. § 160A-48. State law defines the permissible purposes for,

and scope of, such annexation, establishes administrative procedures to be employed by the municipalities, and provides for limited state judicial review of annexation decisions. Id. §§ 160A-48 to -54. The six cases before us arose from four annexation ordinances adopted by the cities of Winston-Salem and Charlotte. Each ordinance provided for the annexation into the municipality of certain real property located outside the city limits.

In each case, the landowner filed suit in the district court seeking to have the city ordinance, and the underlying annexation, declared unconstitutional under the due process clause of the Fourteenth Amendment. The plaintiffs alleged in their complaints that the reason for each annexation was a

desire to increase the city's tax revenues and its allocation of state revenue-sharing funds, that the services to be provided by the city in the annexed area would be inferior to services already available, and that the city officials acted arbitrarily in choosing to annex more prosperous areas while not incorporating poorer ones. Plaintiffs also alleged that the judicial review provisions under state law, id. § 160A--50, unconstitutionally bar judicial review of whether annexation decisions are arbitrary and capricious.

The district courts concluded that plaintiffs were not entitled to relief based on these allegations, and dismissed the cases. Plaintiffs now appeal; the City of Charlotte cross-appeals the denial of its request for attorneys' fees.

II.

It has long been held that the creation and redrawing of the political subdivisions of a state, unlike the exercise of power by those subdivisions,2/ are peculiarly matters involving state political concerns. Indeed, the Supreme Court early in this century flatly stated that "annexation by a city or town is purely a state political matter, entirely within the power of the state legislature to regulate." Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). The Court there recognized that municipal

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2/ Municipalities and other state subdivisions may, of course, be sued when in exercising state powers such as the power to condemn land or the police power they violate rights secured by the Constitution or laws of the United States.

annexations often simply represent the internal political reordering of a state.

Subsequent decisions have made clear, however, that municipal annexations are subject to at least some scrutiny under both the Fifteenth and Fourteenth Amendments to the United States Constitution. In Gomillion v. Lightfoot, 364 U.S. 339 (1964), the Supreme Court invalidated an Alabama law redefining the municipal limits of Tuskegee where that redefinition was motivated by a desire to disenfranchise black citizens. And in Hayward v. Clay, 573 F.2d 187, 190 (4 Cir. 1978), we held that if the annexation decision is to be made through a general vote of the city's inhabitants, the inhabitants of the area proposed for annexation must be afforded the right to vote as well.

Nonetheless, we noted in Berry v. Bourne, 588 F.2d 422 (4 Cir. 1978), that exceptions to the general rule that annexations are to be accorded considerable deference have been recognized only in those two situations. Moreover, the principle of according such deference has subsequently been reaffirmed by the Supreme Court:

> In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: "The number, nature and duration of the powers conferred upon municipal corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." While the broad statements as to state control have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist.,3/ we

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3/ Referring to Kramer v. Union Free School District, 391 U.S. 621

(Footnote cont'd on next page)

> think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.

Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978). We think it plain, based on these cases, that the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment

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(Footnote cont'd)

> (1969), which held that a restriction of the right to vote in school district elections to owners and lessees of taxable real property and to parents and custodians of children enrolled in the public schools violated the equal protection clause of the Fourteenth Amendment.

only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications. See Moorman v. Wood, 504 F. Supp. 467, 471-73 (E.D. Ky. 1980).

III.

When tested against this principle, plaintiffs' allegations, even if true, do not entitle them to relief under the Fourteenth Amendment. The allegation that prosperous areas were selected for annexation while less prosperous areas were ignored does not constitute the creation of a suspect classification. Nor is there any fundamental right to be free of additional state taxation. Gomillion made clear that the due process clause "affords no immunity against mere inequalities in tax burdens, nor does it afford protection

against their increase as an indirect consequence of a State's exercise of its political powers." 364 U.S. at 343; see also Deane Hill Country Club, Inc. v. Knoxville, 379 F.2d 321, 325 (6 Cir. 1967) (Fourteenth Amendment challenges cannot be based on pecuniary repercussions in the form of the ordinary incidence of city taxation).4/ No suspect classification or fundamental

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4/ Given our conclusion that the Fourteenth Amendment is not violated where, as here, the proposed annexation does not impinge on fundamental rights or create suspect classifications, there is no right under the Fourteenth Amendment to challenge annexation decisions alleged merely to be arbitrary and capricious. There is, accordingly, no federal right to have state courts hear such challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law.

right is therefore implicated, and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution.

IV.

Although we conclude that plaintiffs have not asserted claims entitling them to relief, we think that the claims were not so frivolous, unreasonable or groundless that the district court abused its discretion in declining to award attorneys' fees to the City of Charlotte.

AFFIRMED.

APPENDIX B

Floyd C. and Ruby S. BALDWIN, William Edward Kirby, Jr. and Brenda Head Kirby, Richard B. and Frances S. Charles, Plaintiffs,

and

Raymond and Dorothy Wigley, Intervenors,

v.

CITY OF WINSTON-SALEM, Mayor Wayne A. Corpening, Vivian H. Burke, Marilyn S. Harpe, Larry D. Little, Virginia K. Newell, Robert S. Northington, Jr., Ernestine Wilson, Larry W. Womble and Martha S. Wood, Defendants.

No. C-81-838-WS.

United States District Court, M. D. North Carolina, Winston-Salem Division.

July 28, 1982.

MEMORANDUM OPINION AND ORDER

HIRAM H. WARD, Chief Judge.

The Complaint (December 16, 1981) alleged a fourteenth amendment attack on the North Carolina annexation statutes, N.C. Gen. Stat. §§ 160A-45 et seq., and the annexation by the City of Winston-Salem of the plaintiffs' property. No one disputes that in annexing the plaintiffs' property the City accurately followed the procedure set forth in the statutes and that the annexation was completed and implemented before the plaintiffs began this lawsuit. The parties have filed cross-motions for summary judgment.

Plaintiffs seek a declaratory judgment that portions of the statutes are unconstitutional. In particular, they claim that N.C. Gen. Stat. § 160A-50

restricts state court review of annexations and prevents annexation challenges based on due process grounds. Motion (February 17, 1982). Defendants seek dismissal of the entire action on numerous grounds, including: failure to state a claim upon which relief can be granted, statute of limitations bar, laches, res judicata and collateral estoppel, and lack of standing. The North Carolina Supreme Court has already upheld this same annexation in a suit brought by different landowners represented by different attorneys. In Re Annexation Ordinance, Etc., 303 N.C. 220, 278 S.E.2d 224 (1981). This Court conducted a hearing on the motions on July 26, 1982.

Both the United States Supreme Court and the Fourth Circuit Court of

Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:

> Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40 [46], 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." ... Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.

Accord Carlisle v. City of Charlotte, (W.D.N.C. 1982) (C-C-81-553-M, July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its firm language from the facts of this case.5/ Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and the same hereby is, DENIED. IT IS FURTHER ORDERED that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED.

A judgment dismissing this action will be entered accordingly.

5/ Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case.

APPENDIX C

RAINTREE
HOMEOWNERS ASSOCIATION, INC.,
et al., Plaintiffs,

v.

CITY OF CHARLOTTE,
et al., Defendants.

Nos. C-C-81-553-M, C-C-82-325-M.

United States District Court,
W. D. North Carolina,
Charlotte Division.

June 2, 1982.

Memorandum of Decision and Order

July 13, 1982.

ORDER

McMILLAN, District Judge.

This matter is before the court on the plaintiffs' motion for a temporary restraining order. The action was filed on May 25, 1982. Notice was given to counsel for all parties on May 26, 1982, that a hearing would be held on this motion at 9:30 a. m. on May 27, 1982.

Counsel for all parties appeared at such date and time.

The defendant City and its defendant Council members caused a resolution to be adopted on April 26, 1982, pursuant to N.C.G.S. § 160A-49(a), stating their intent to consider annexation of an area generally described as the Raintree/Providence Plantation Area. That area is further described in the resolution by a metes and bounds description. That same resolution called for a public hearing to be held on the question of annexing this area at 3:00 p. m. on May 27, 1982. Pursuant to N.C.G.S. § 160A-49(e), the defendant City and defendant Council members may not adopt any ordinance annexing any or all of the area until the seventh day following the public hearing.

In view of the facts presented to the court, and the decisions of Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), it is unlikely that the plaintiffs will succeed in their Fourteenth Amendment claims. Further, the plaintiffs have not shown sufficient danger of irreparable injury to justify the relief they now seek.

IT IS THEREFORE ORDERED that the plaintiffs' motion for a temporary restraining order is denied.

MEMORANDUM OF DECISION
AND ORDER

On Motions For Summary Judgment
and Dismissal

The plaintiffs in these actions, filed under 42 U.S.C. § 1983, are residents of areas known as Coulwood (No. C-C-81-553-M), and Raintree/Providence Plantation (No. C-C-82-325-M) ("Raintree"). The City of Charlotte (the "City") has effectively annexed Coulwood and has adopted an ordinance which makes the annexation of the Raintree/Providence Plantation areas effective in 1983. The plaintiffs allege that as a result of these annexations, they have been deprived of constitutional rights guaranteed under the due process clause of the Fourteenth Amendment. Because dispositive legal issues are common to each case, these actions have been considered together.

COULWOOD

The Coulwood area lies to the northwest of the center of Charlotte. Major roads running through Coulwood include Mount Holly, Tom Sadler and Valleydale as well as Bellhaven Boulevard. The area contains over 800 dwelling units and about 2,700 residents, and covers about 1,300 acres. The City's proposal to annex Coulwood describes the area as primarily residential with some commercial uses along Bellhaven Boulevard, Tom Sadler and Mount Holly Roads.

On March 24, 1980, the City Council adopted Annexation Ordinance 301-X annexing Coulwood into the City. The ordinance was challenged by Coulwood residents in Mecklenburg County Superior Court. By statute this stayed the

effective date of the annexation. On September 10, 1980, that court entered an order affirming the annexation. The North Carolina Supreme Court affirmed the annexation on December 1, 1981. The Coulwood annexation became effective on December 21, 1981. This action was then filed on December 30, 1981. The plaintiffs are individual homeowners and residents of Coulwood.

RAINTREE/PROVIDENCE PLANTATION

The Raintree and Providence Plantation areas lie to the southeast of the center of Charlotte. The area to be included within the City, includes, but is not limited to, about 2,280 acres which are used for residential purposes. Much of the remaining acreage is used for commercial, industrial, institutional and governmental purposes.

On April 26, 1982, the City Council adopted a resolution to annex the Raintree and Providence Plantation areas. On May 25, 1982, the plaintiffs, the Raintree Homeowners Association and five individual residents of these areas, filed this action. No previous challenge to the annexation has been initiated in the state courts. At the plaintiffs' request, a hearing on a motion for a temporary restraining order to stop further action by the City was held on May 27, 1982. On June 2, 1982, an order was entered denying that motion.

On June 3, 1982, the City Council adopted Annexation Ordinance No. 1182-X annexing the Raintree and Providence Plantation areas. However, the annexation is not to become effective until May 30, 1983.

MOTIONS BEFORE THE COURT

The City has moved to dismiss the Coulwood action on the grounds that the suit is barred by laches, res judicata and the statute of limitations, and that the plaintiffs lack standing. The City has moved to dismiss the Raintree/Providence Plantation action on grounds of comity and federalism, and assert that the plaintiffs lack standing and that there is no case or controversy before the court.

It is doubtful that these defenses bar either of the actions. However, final resolution of these issues is not necessary to the court's decision. The interests of the parties are best served by a prompt and complete decision on the merits of these cases.

DUE PROCESS CLAIMS

On February 25, 1982, the Coulwood plaintiffs filed a motion for a partial summary judgment on their first cause of action. On June 14, 1982, the Raintree/Providence Plantation plaintiffs filed an identical motion.

The City, on May 26, 1982, filed a motion for dismissal of the entire cause of action for failure to state a claim and for summary judgment in the Coulwood case. On June 11, 1982, the City filed a motion to dismiss the Raintree/Providence Plantation action.

A hearing on these motions was conducted on June 22, 1982.

The plaintiffs state two causes of action in each case:

1. That N.C.G.S. § 160A-50(f), which governs judicial

review by state courts of all annexations within the state, as interpreted by the North Carolina Supreme Court, is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution.

2. That the annexation by the City of Coulwood, or of Raintree/Providence Plantation, is arbitrary, capricious, unreasonable, and an abuse of discretion by the City in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

In support of these claims, the complaint in the Coulwood action alleges, inter alia, that:

> Evidence in the Superior Court action demonstrated that the City acted improperly in drawing the boundaries of the annexed areas by including some tracts and not others.
>
> Evidence showed that the City services were neither requested nor wanted by residents of Coulwood.

These allegations are essentially repeated in the Coulwood plaintiffs' motion for partial summary judgment. They contend that the facts before the Superior Court and the City Council were, inter alia, that:

> The primary result of the annexation for Coulwood residents is higher taxes.
>
> That city services were neither needed nor wanted by Coulwood residents.
>
> That the City excluded a nearby area because it contains housing units of low value.

The Raintree/Providence Plantation plaintiffs allege in their complaint that, if permitted by N.C.G.S. § 160A-50(f), they would challenge the annexation with evidence that:

> If the area belongs in any municipality, it should be Matthews (a nearby town) rather than Charlotte.
>
> The City included Raintree and Providence Plantation but not the less affluent areas of Oakdale-Hunter Acres, which are in greater need of the City's services.
>
> The City has not annexed the very affluent area of Quail Hollow, which plaintiffs claim is closer to the center of town than are Raintree and Providence Plantation.
>
> The City has deleted certain areas to meet certain statutory standards.
>
> The City's primary purpose is to raise tax revenue.

Raintree and Providence Plantation have services which are superior to those offered by the City.

The Raintree/Providence Plantation plaintiffs repeat these allegations as the undisputed material facts in support of their motion for partial summary judgment. Specifically, they state that, if permitted by the judicial review provision, they would introduce evidence in Superior Court to show the "unreasonableness" of the annexation. An affidavit by Larry L. Falcone, a Raintree resident and president of the Raintree Homeowners Association, is also offered in support of the Raintree/Providence Plantation motion for summary judgment. His assertions of fact are identical to those in the complaint and those in support of the motion for partial summary judgment.

The facts alleged by the plaintiffs to be undisputed are only offered in support of their motion for summary judgment on their first cause of action, which challenges the judicial review portion of the annexation laws. The plaintiffs are not asking for summary judgment on their claim that each of the challenged annexations is, in fact, arbitrary, capricious and unreasonable. Rather, they assert that it is undisputed that they would introduce evidence to try to show that the annexations are arbitrary, capricious and unreasonable if permitted to do so under the judicial appeal provision of the statute.

For the reasons discussed below, the court is of the opinion that the plaintiffs' motion in each action should

be denied, and that the City's motions for dismissal for failure to state a claim should be granted in each action.

The Coulwood and the Raintree/Providence Plantation plaintiffs (the "plaintiffs") allege that N.C.G.S. § 160A-50(f) is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution because, as interpreted by the North Carolina Supreme Court, it denies them adequate review of the annexations in state court. The challenged provision states that:

> (f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court

> without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either
>
> (1) That the statutory procedure was not followed, or
>
> (2) That the provisions of G.S. 160A-47 were not met, or
>
> (3) That the provisions of G.S. 160A-48 have not been met.

The statutory procedure referred to in (f)(1) is set out in N.C.G.S. § 160A-49. That provision requires notice of a public hearing, and sets out guidelines for the public hearing prior to an annexation. N.C.G.S. § 160A-47 requires the City to prepare maps and plans for the services to be provided to the annexed areas. N.C.G.S. § 160A-48 establishes guidelines for the character

of areas to be annexed. Section 160A-48 requires certain contiguous boundaries between the City and the annexed area, and requires that part or all of the area be developed for urban purposes. Urban purpose is defined, in part, in terms of population and usage of the area to be annexed.

Plaintiffs assert that their Fourteenth Amendment rights are denied because § 160A-50(f) limits the grounds upon which they may challenge an annexation to those specifically enumerated in the statute and bars them from arguing that a annexation is arbitrary, capricious and unreasonable. In In Re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), the North Carolina Supreme Court rejected the assertion that plaintiffs challenging

Winston-Salem annexation had a right to argue that an annexation was arbitrary and unreasonable independent of the grounds listed in N.C.G.S. § 160A-50(f). The Court held that on review of an annexation, a Superior Court may only hear claims based upon the grounds set out in § 160A-50(f), and expressly stated, "Nor do we find a separate test of 'reasonableness' within the limited scope of judicial review permitted in annexation cases." 278 S.E.2d at 231.

Assuming, arguendo, that the due process clause of the Fourteenth Amendment gives the plaintiffs the right to argue on appeal that the annexations are unreasonable, the plaintiffs nonetheless would not be entitled to the relief they seek under their first cause of action. N.C.G.S. § 160A-50(f) and

the provisions incorporated therein, amount to a requirement that the Superior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the City. Upon a challenge to North Carolina's annexation law shortly after its enactment in 1959, the North Carolina Supreme Court in In Re Annexation Ordinances Nos. 866-870, etc., 253 N.C. 802, 117 S.E.2d 795 (1961), upheld the provisions, explaining that:

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in

> good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas, comparable to the services provided for the residents within the city prior to annexation of the new area or areas.

117 S.E.2d at 802.

Further, the plaintiffs are not entitled to relief because their allegations do not bring them within the protection of the Fourteenth Amendment. In Hunter v. Pittsburgh, 207 U.S. 161, 178-79, 28 S.Ct. 40, 46-47, 52 L.Ed. 151 (1907), the United States Supreme Court

held that challenges to annexations generally are not actionable under the Fourteenth Amendment. Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978) makes it clear that Hunter v. Pittsburgh is still good law. In Berry v. Bourne, the district court's dismissal of the plaintiff's motion for a preliminary injunction to stop an annexation was affirmed. The Berry plaintiffs claimed that the challenged annexation violated their rights under the equal protection clause of the Fourteenth Amendment because registered voters were not given an opportunity to vote on the annexation. Hunter v. Pittsburgh, supra, was cited by the court for the principle that:

> [A]nnexation by a city or town is purely a state political or legislative matter, entirely within the power of the legislature to regulate.... Thus [Hunter v. Pitts-

> burgh], has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.

588 F.2d at 424.

Exceptions to the rule that challenges to annexations do not generally lie under the Fourteenth Amendment have been recognized in limited circumstances. A city may not manipulate its boundaries for the purpose of removing voters from the city because of their race; Gomillion v. Lightfoot, 364 U.S. 339, 345, 81 S.Ct. 125, 129, 5 L.Ed.2d 10 (1960). If the state chooses to give residents of an area to be annexed an opportunity to vote on the annexation, that right must be afforded in a manner which comports with the equal protection clause, Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978) (If

the right to vote is given, all registered voters, not just freeholders, must be allowed to vote). However, these limited exceptions are not invoked by the allegations in the actions before the court.

Implicit in those decisions is the principle that fairness requires that those who share in the benefits of a nearby city bear a proportionate share of the costs of providing those benefits.

The allegations in the actions before the court describe a conflict between people who now live just outside Charlotte, but who derive benefit from the City, and City officials who are obliged to seek funding for the benefits the City provides. These cases thus fall squarely within the letter and the

spirit of the law that state legislatures have the responsibility for deciding where and how issues arising out of annexation are to be resolved.

Thus, taking all of the plaintiffs' allegations and showings as true, Hunter v. Pittsburgh, supra, and Berry v. Bourne, supra, make it clear that neither cause of action, in either of these cases, presents a basis upon which relief could be granted.

IT IS THEREFORE ORDERED that:

1. Plaintiffs' motions for partial summary judgment are denied.

2. The defendants' motions for dismissals are allowed.

3. These actions are dismissed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

JUDGMENT

THIS CAUSE came on for hearing on plaintiffs' motion for summary judgment as to their first and second causes of action, and on defendants' motion for summary judgment, before the undersigned at the Federal Courthouse in Greensboro, North Carolina on Friday, October 1, 1982. At the hearing on said motions the plaintiffs were represented by Mr.

Rosbon D. B. Whedbee of Winston-Salem, North Carolina and by Mr. James Hamilton of the Washington, D.C. law firm of Ginsburg, Feldman, Weil and Bress, Chartered; and the defendants were represented by Roddey M. Ligon, Jr. of the Winston-Salem law firm of Womble, Carlyle, Sandridge & Rice, and by City Attorney Ronald G. Seeber. The Court, having considered the pleadings, affidavits, motions, briefs, and oral arguments, adjudges as follows:

1. Plaintiffs' First Cause of Action.

The plaintiffs moved for summary judgment on their first cause of action asserting that the annexations by the City of Winston-Salem challenged by this action are unconstitutional in that they cannot be subjected to proper judicial

review under state law. With respect to this contention, this Court adopts the opinion of Chief Judge Ward entered in the case of Baldwin, et al. v. City of Winston-Salem, et al., C-81-838-WS, filed July 28, 1982, and dealing with the same issue as that raised in this portion of plaintiffs' motion.

The memorandum opinion of Chief Judge Ward states, in part:

> "Both the United States Supreme Court and the Fourth Circuit Court of Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:
>
> 'Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40, 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or

legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." . . . Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.'

Accord, Carlisle v. City of Charlotte, _____ F. Supp. _____ (W. D.N.C. 1982) (C-C-81-533-M, July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its firm language from the facts of this case.6/ Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

6/ "Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case."

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and same hereby is, DENIED."

For the reasons stated therein, the plaintiffs' motion for summary judgment as to its first cause of action must be denied.

2. Plaintiffs' Second Cause of Action.

The plaintiffs next move for summary judgment on their second cause of action. They assert that the annexations by the City challenged in this action are unconstitutional because persons such as plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman reside or operate businesses in the annexed areas but do not own real property in the annexed areas; and,

therefore, cannot seek judicial review of the annexation under the North Carolina statutes. The defendants respond that the North Carolina law allows any property owner -- not just real property owners -- to challenge North Carolina annexations. During oral argument counsel for the plaintiffs and defendants advised the Court that Henry Brewer, Robert M. Bircham and Gladys Norman are parties plaintiff to a pending action in the Superior Court of Forsyth County, North Carolina, which said action challenges the validity of the annexations involved here. Consequently, this Court is of the opinion that this portion of plaintiffs' motion for summary judgment is moot. This Court does not feel that these plaintiffs may, at this time, contend in this

Court that they do not have a right to contest the annexations in state court when they are in fact at this time contesting the annexations in state court. Thus, the Court feels that the plaintiffs' motion for summary judgment as to their second cause of action must be denied. The Court holds, however, that should the state court judicially determine that the above-named plaintiffs do not have standing to contest the validity of the annexation in state court, plaintiffs would be authorized to reopen this case in order to raise this issue at that time.

3. Defendants' Motion for Summary Judgment.

The defendants move for summary judgment as to all of plaintiffs' claims. For the reasons stated herein,

as well as those stated in the Memorandum Opinion of Chief Judge Ward adopted by this Court, the defendants' motion for summary judgment should be allowed.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiffs' motion for summary judgment on the first cause of action is denied; that plaintiffs' motion for summary judgment on the second cause of action is deemed to be moot and thus denied subject to the right of plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman to reopen this case in the event the state court should hold that said plaintiffs do not have standing in the state court action; and, the defendants' motion for summary judgment is allowed.

- S -
United States District Judge

November 16, 1982

APPENDIX E

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

§ 160A-50. Appeal. -- (a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within

five days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-47.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been

met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within three

months from receipt of such instructions, the annexation proceeding shall be deemed null and void.

(h) Any party to the review proceedings, including the municipality, may appeal to the Supreme Court from the final judgment of the superior court under rules of procedure applicable in other civil cases. The appealing party may apply to the superior court for a stay in its final determination, or a stay of the annexation ordinance, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court; provided, that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated

into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior or Supreme Court, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. (1959, c. 1009, s. 6; 1973, c. 426, s. 74.)

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83-572

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLOYD C. BALDWIN, et al.,

Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Roddey M. Ligon, Jr.
Counsel of Record
Womble, Carlyle, Sandridge
& Rice
2400 Wachovia Building
Post Office Drawer 84
Winston-Salem, N.C. 27102
(919) 721-3619
(Other counsel listed on inside cover)

APPELLATE PRINTING SERVICES, INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

QUESTION PRESENTED FOR REVIEW

Is the decision of the United States Court of Appeals for the Fourth Circuit upholding North Carolina's annexation statutes, and Respondent's actions thereunder, consistent with decisions of the Supreme Court of the United States and applicable constitutional principles?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-572

FLOYD C. BALDWIN, et al.,

Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents are the cities of Winston-Salem and Charlotte, North Carolina, and their respective Mayors and members of their governing boards. Respondents respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the case of Baldwin v. City of

Winston-Salem, North Carolina, 710 F. 2d 132 (4th Cir. 1983).

STATEMENT OF THE CASE

Petitioners ask the Supreme Court of the United States to review a decision of the United States Court of Appeals for the Fourth Circuit affirming decisions by the Middle and Western Districts of North Carolina which sustained the North Carolina annexation statutes.[1] Relying primarily on Hunter v. Pittsburgh, 207 U.S. 161 (1907) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), and applicable

---

[1] Baldwin v. City of Winston-Salem (82-1761(L)) and Carlisle v. City of Charlotte (82-1768) involve annexations upheld by the North Carolina Supreme Court. (In Re Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981); In Re Annexation Ordinance 301-X, 304 N.C. 565, 284 S.E.2d 475 (1981)). Both Baldwin and Carlisle challenge annexations which were fully implemented prior to filing and remain today incorporated within the municipal Respondents. Brewer v. City of Winston-Salem (82-2120) and Raintree Homeowners Association, Inc. (82-1767) involve annexations which have been affirmed at the trial level and are now waiting review by the North Carolina Court of Appeals.

North Carolina statutes, the Federal District Court in each case dismissed the Petitioners' actions after determining that the allegations did not establish a basis for relief under the due process clause of the Fourteenth Amendment. The United States Court of Appeals for the Fourth Circuit affirmed the trial courts (710 F.2d 132) in a per curiam decision. The Fourth Circuit, relying on Hunter as well as Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), held that the Petitioners' allegations, even if true, failed to establish a claim entitling them to relief under the Fourteenth Amendment. 710 F.2d at 135.

SUMMARY

The decision of the Fourth Circuit is consistent with the decisions of the Supreme Court of the United States

interpreting the Fourteenth Amendment and this petition for writ of certiorari should therefore be denied. The Fourth Circuit correctly recognized that "it has long been held that the creation and redrawing of the political subdivisions of the state, unlike the exercise of power by those subdivisions, are peculiarly matters involving state political concerns." 710 F.2d at 134. The Fourth Circuit further observed that later decisions of the Supreme Court of the United States have reaffirmed the Hunter decision; and, that while municipal annexations are subject to scrutiny under the Fourteenth Amendment when the infringement of fundamental rights or the creation of suspect classifications are alleged, no such issue is implicated in this case. Therefore, Petitioners' allegations, even if true, would not entitle them to relief under the Fourteenth Amendment. 710 F.2d

at 135. The decision of the Fourth Circuit is consistent not only with Hunter, but also with the subsequent cases of Gomillion v. Lightfoot, supra and Holt Civic Club v. Tuscaloosa, supra.

Contrary to Petitioners' allegations, the scope of judicial review of annexations in North Carolina is not limited. Case law makes it abundantly clear that the North Carolina courts will review and decide the constitutionality of annexations and the annexation statutes. Compliance with those statutes, the courts have held, where the statutes themselves are constitutional, establishes that the annexations are not arbitrary or unreasonable.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONSISTENT WITH APPLICABLE LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. Applicable Law of the Supreme Court.

The law applicable to this case, and relied upon by the District Courts and the Fourth Circuit, is clearly set out by the United States Supreme Court in the case of Hunter v. Pittsburgh, supra (and has been followed by the Fourth Circuit in this case and in the case of Berry v. Bourne, supra). Hunter arose from a challenge of a Pennsylvania statute which permitted a larger municipality to annex a smaller one despite the fact that a majority of the citizens of this smaller municipal corporation desired not to be annexed. The plaintiffs in Hunter challenged the annexation on a number of points, including due process grounds similar to those raised in this case. Hunter at 168-169.

This Court upheld the annexation, despite plaintiffs' constitutional challenge, on the basis of the following

governing principles:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold in itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the

> consent of the citizens, or even against their protest. In all of these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the states are alone responsible for any unjust or oppressive exercise of it. Id. at 178-79.

Thus, in Hunter, this Court made it absolutely clear that the extension of municipal boundaries was a matter governed by state rather than federal law.

Petitioners have gone to great lengths in an effort to create the illusion that the legal principles supporting Hunter "have long since been

overruled and that, as a consequence, Hunter itself has lost much of its precedential force." (Petition, p. 15). Their theory as to Hunter's demise is contradicted by two recent decisions of this Court reaffirming Hunter.

In Gomillion v. Lightfoot, supra, this Court affirmed the basic principles of Hunter. While the Supreme Court originally decided to hear that case in order to consider issues under both the Fourteenth and Fifteenth Amendments, its decision was based solely upon the Fifteenth Amendment (voting rights denied on the basis of race). In doing so, the Gomillion Court expressly held:

> Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular

> prohibition of the Constitution considered in those cases. 364 U.S. at 344 (emphasis added).

Gomillion expressly recognizes Hunter to be good law. Gomillion expressly recognizes that Hunter holds that the Fourteenth Amendment's Due Process Clause does not apply to annexations by municipal corporations and re-affirms that holding. The proposition bears restatement: Gomillion expressly affirms Hunter's holding that a state's authority to modify the boundaries of its political subdivisions is "unrestrained" by the Fourteenth Amendment's Due Process Clause.

The Gomillion opinion makes it clear that its decision in reference to the Fifteenth Amendment does not alter the Hunter decision as to the application of the Fourteenth Amendment -- ". . . [I]f one principle clearly emerges from the numerous decisions of this Court dealing with taxation, it is that the Due Process

Clause affords no immunity against mere inequalities in tax burden, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political power." Id. at 343. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review." Id. at 347.

The constitutional principles established by Hunter were most recently reaffirmed by this Court in Holt Civic Club v. City of Tuscaloosa, supra. While Petitioners have quoted one statement from Holt out of context suggesting that Hunter has been "qualified by later cases" (Petition, p. 31), they fail to recognize that Holt represents a strong affirmation of the underlying principle that the circumstances presented by this case raise no issue of Fourteenth Amendment due process rights.

In Holt, the plaintiff organization challenged a state statute authorizing municipalities to exercise certain powers over persons and property within three miles of their city limits. Persons residing within the affected extra-territorial area could not vote for the city's elected officials. The Supreme Court dismissed the challenge to the state statute on the grounds that it lacked substantive merit as it "alleged no claim cognizable under the United States Constitution." Id. at 66.

In reaching its determination in Holt, this Court held that persons within the extraterritorial area did not have the constitutional right to vote on municipal policies affecting the persons and property within the subject area. Id. at 69-70. "Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama

statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose." Id. at 70.

In this regard, the Court noted the following:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' Anderson v. Dunn, 6 Wheat 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them'. Hunter v. Pittsburgh, 207 U.S. 161, 178. See also, e.g., Sailors v. Board of Education, 387 U.S., at 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964). In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the

> absolute discretion of the State.' Ibid. While the broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist., supra, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitute that States have in creating various types of political subdivisions and conferring authority upon them. Holt at 71 (footnote omitted).

Thus, it is clear that Hunter is alive and well, and is still the governing law as to the questions involved in this case.

This Court concluded "that Alabama's police jurisdiction statutes violate neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment." Id. at 75. Obviously, the same holding is appropriate in this case. As in Holt, the state statute challenged by Petitioners is a reasonable exercise of North Carolina's

power to provide for municipal government. Therefore, pursuant to Hunter and Holt, the statute is not subject to consititutional challenge. See also, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489 (1977) ("The statute does not involve any discernable fundamental interest or affect with particularity any protected class . . . [T]he test of constitutionality, therefore, is whether the statute has a rational relation to a legitimate state interest.")

B. The Law of the Fourth Circuit Is Consistent With the Law of the Supreme Court.

The decision of the Fourth Circuit in this case, Baldwin v. City of Winston-Salem, supra, and Berry v. Bourne, supra, follow the principles of Hunter, Gomillion and Holt Civic Club. Respondents respectfully submit that the Petitioners have misrepresented the Fourth Circuit

decision in Baldwin when they say "because the Fourth Circuit in this case held that arbitrary and capricious annexation did not violate federal due process, it also held that there is no federal constitutional right to have state courts hear challenges to arbitrary and capricious annexation decisions." (Petition, pp. 33-34). The court's conclusion was based on its determination that the Fourteenth Amendment is not violated where, as in the case before the court, the "proposed annexation does not impinge on fundamental rights or create suspect classifications . . . ." Indeed, the Fourth Circuit's conclusion in this regard was based on the fact that the allegations of the Plaintiffs in Baldwin, even if true, did not raise a colorable claim under the Fourteenth Amendment. Baldwin at 135. As the Fourth Circuit pointed out, the exceptions to Hunter which have been

recognized by the United States Supreme Court in Gomillion and Holt have not been alleged in this case. "No suspect classification or fundamental right is therefore implicated and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution." Baldwin at 135.

Support for the Fourth Circuit's decision in Baldwin is also found in the decision of Judge McMillan of the Western District of North Carolina in Raintree Homeowners Association v. Charlotte, 543 F.Supp. 625 (W.D.N.C. 1982), one of the four cases consolidated in the Fourth Circuit. The Federal District Court in that case stated:

> Assuming arguendo, that the due process clause of the Fourteenth Amendment gives the plaintiffs the right to argue on appeal that the annexations are unreasonable, the plaintiffs nonetheless would not be entitled to the relief they seek under their first cause of action. N.C.G.S.

> 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Superior court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the City. 543 F.Supp. at 629.

The governing decision in the Fourth Circuit prior to Baldwin, Berry v. Bourne, supra, properly construed the relationship between Hunter and Gomillion. Hunter, the Berry Court said:

> has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds. The single exception to the rule, [citing Gomillion in a footnote] which subsequent decisions have established, is confined to challenges resting on alleged racial discrimination. We are not concerned here with a racial claim, only with an equal protection claim. Berry at 423-24 (footnotes omitted).

Thus in Berry, as in other decisions of the

Fourth Circuit, involuntary annexations have been upheld as being consistent with the U.S. Constitution. See Citizens Committed to Oppose Annexation v. City of Lynchburg, 528 F.2d 816 (4th Cir.), application denied 423 U.S. 1043 (1976); Garren v. City of Winston-Salem, 463 F.2d 54 (4th Cir.), cert. denied 409 U.S. 1039 (1972); Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972) (three-judge district court).[2]

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[2]Petitioners allege (Petition, p. 32, n.5) a "division in the circuits" based on Doyle v. Municipal Commission of Minnesota 340 F.Supp. 841 (D. Minn.), aff'd,468 F.2d 620 (8th Cir. 1972); and Adams v. City of Colorado Springs, 308 F.Supp. 1397, 1405 (D.Colo.), aff'd 399 U.S. 901 (1970). Respondents note that these decisions are not federal court of appeals decisions as called for under Rule 17.1(a) of the Revised Rules of the Supreme Court of the United States. Doyle considered the reasonableness of statutory provisions for judicial review. Doyle at 844. Adams dealt with the reasonableness of the statutory classification of areas for annexation. Adams at 1403-04. In both cases, the decisions of the court were to uphold statutory provisions. Respondents respectfully submit that these decisions are not inconsistent with the position of the Fourth Circuit.

II. THE NORTH CAROLINA SUPREME COURT DOES REVIEW ANNEXATIONS TO DETERMINE REASONABLENESS AND COMPLIANCE WITH DUE PROCESS AS WELL AS OTHER CONSTITUTIONAL STANDARDS.

Petitioners' request for review by this Court is also based on their assertion that under North Carolina law judicial review of annexations is limited and that the North Carolina Supreme Court will not review the constitutionality or reasonableness of municipal annexations. (Petition, pp. 32-33) The Petitioners are simply incorrect with reference to this basic premise. It is very clear from the decisions of the North Carolina Supreme Court that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Petitioners.

The first decision concerning the constitutionality of the annexation statutes

at issue in this case considered all manner of constitutional questions including whether those statutes violated due process of law under the Fourteenth Amendment of the U.S. Consititution. In Re Annexation Ordinance No. 866, 253 N.C. 637, 640-41, 117 S.E.2d 795, 798 (1961). In this seminal decision, it was held that the procedures provided by the statutes are substantial ones which protect the rights of newly-annexed citizens.

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas; comparable to the services

provided for the residents within the city prior to annexation of the new area or areas. 253 N.C. at 647, 117 S.E.2d at 802.

In view of its judicial review of and interpretation of the statutes, the North Carolina Supreme Court held that they were not in violation of due process.

> The petitioners contend that by reason of these annexations in the manner in which they have been brought about, they have been deprived of their liberty and property without due process of law, in violation of Article I, Section 17 of the Consitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The record in these proceedings does not support the petitioners' contention in this respect. Certainly it would seem that they do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the

> of the State and Federal Constitutions. 253 N.C. at 651-52, 117 S.E.2d at 805.

With respect to whether or not the North Carolina court will review "reasonableness", the North Carolina Supreme Court said in Moody v. Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980): "The review (of annexations) is afforded pursuant to G.S. 160A-50 and serves as a safeguard against unreasonable and arbitrary action by the annexing municipality." The principle that compliance with a constitutional statute established constitutional reasonableness was recognized by Judge McMillan in Raintree Homeowners Association v. City of Charlotte, supra, one of the cases joined in this Petition.

> N.C.G.S. 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Superior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of

> the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the city.

Id. at 629.

The willingness of the North Carolina Supreme Court to consider constitutional questions other than "reasonableness" which are properly raised in state court proceedings is fully illustrated by its consideration of the same annexations which are at issue in the Baldwin case. In Re Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981). In that case, the North Carolina Supreme Court considered several constitutional questions and addressed generalized grievances concerning the "reasonableness" of the annexations and held: (1) that the annexation statutes were not an unconstitutional delegation of authority by the state to the governing boards of municipalities; (2) that the statutes were not

unconstitutionally vague; (3) that the fact that persons residing within the annexed areas did not get to vote on the matter did not violate either due process or equal protection; (4) that the residents of the annexed areas were protected in their rights to receive municipal services such that no constitutional questions were at issue in that regard; (5) that unilateral annexation was not unconstitutional as "taxation without representation" pursuant to either due process or equal protection guarantees; and, (6) that the annexation statutues were not unconstitutional on the grounds that judicial review if provided by a judge sitting as trier-of-fact, rather than by way of a jury trial. 303 N.C. at 224-30, 278 S.E.2d at 228-30.

It is obvious that the North Carolina Supreme Court was more than willing to review, and in fact did review, constitutional questions raised in reference to

the annexations involved in the Baldwin case. Moreover, it is apparent from that opinion and numerous other cases that the North Carolina Supreme Court has frequently reviewed these issues in annexation cases. For example, the state courts have considered the applicability of due process guarantees of the Fifth Amendment of the U.S. Consititution, in addition to those guarantees provided by the Fourteenth Amendment. E.g., Moody v. Town of Carrboro, supra. The state courts have applied an equal protection analysis in appropriate instances (unlike the annexations herein challenged). E.g., Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). The North Carolina Supreme Court has demonstrated its willingness to declare annexations to be invalid. E.g., Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980); see also, Gaskill v. Costlow, 270 N.C. 686,

155 S.E.2d 148 (1967). The North Carolina Supreme Court will consider whether an annexation based solely upon the desire to generate revenue is invalid. See, In Re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 19, 249 S.E.2d 698, 708 (1978). Further, consistent with the foregoing authority, the state court will consider impropriety in the annexation process itself if allegations of the same are supported by "competent and substantial evidence". In Re Annexation Ordinance Adopted by the City of Charlotte, 284 N.C. 442, 452, 202 S.E.2d 143, 149 (1974) (challenging an annexation on grounds that "the City 'acted arbitrarily, capriciously, and unreasonably in that it did not uniformly apply the same standards throughout the entire Annexation Area'"). In the Charlotte case cited above, the North Carolina Supreme Court found the annexation of petitioner's land to be invalid

and reversed the inclusion of petitioner's lands within the annexed area on the basis of an unreasonable application of the annexation statutes. 284 N.C. at 457, 202 S.E.2d at 152.

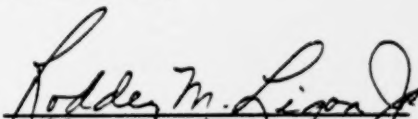
It is clear from these opinions that the statutory annexation requirements are carefully reviewed to ensure compliance with constitutional principles.

CONCLUSION

Respondents respectfully submit that the per curiam decision of the United States Court of Appeals for the Fourth Circuit is consistent with long-standing principles of law articulated by the United States Supreme Court. The challenged decision of the Fourth Circuit creates no division among the Circuit Courts. Also, the constitutionality of the North Carolina annexation statutes and the review afforded in state court under those statutues has been established in both state and

federal courts. As the Federal District Courts and Fourth Circuit Court of Appeals recognize in this case, Petitioners' allegations even if found to be true would not entitle them to relief under the due process clause. For the reasons set forth above, Respondents respectfully submit that the writ of certiorari to the United States Court of Appeals of the Fourth Circuit should be denied.

Respectfully submitted,



Roddey M. Ligon, Jr.
Counsel of Record
Womble, Carlyle, Sandridge & Rice
2400 Wachovia Building
Post Office Drawer 84
Winston-Salem, N.C. 27102
(919) 721-3619.

Ronald G. Seeber

Ralph D. Karpinos

-30-

City Attorney's Office
Post Office Box 2511
Winston-Salem, N.C. 27102
(919) 727-2056

Henry W. Underhill

H. Michael Boyd
City Attorney's Office
City of Charlotte
500 East Trade Street
Charlotte, N.C. 28202
(704) 374-2254

Attorneys for Respondents

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No. 83-572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLOYD C. BALDWIN, *et al.*,
Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

James Hamilton
Counsel of Record
Robert L. Deitz
Susan A. Cobb
Ginsburg, Feldman and Bress, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners
(other counsel listed on inside cover)

November 18, 1983

THE CASILLAS PRESS, INC. - 1717 K Street N. W. - Washington, D. C. - 223-1220

Other Counsel for Petitioners:

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, NC 27106

Attorney for Petitioners Baldwin and Brewer, *et al.*

F. Lee Weaver
Weaver & Bennett, PA
P.O. Box B-925
Matthews, NC 28105

Attorney for Petitioners Raintree Homeowners Association, Inc., *et al.*

Hugh G. Casey, Jr.
Casey & Bishop, PA
700 Law Building
Charlotte, NC 28202

Attorney for Petitioners Derrick, *et al.*

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PETITIONERS' REPLY BRIEF

ARGUMENT

Two points made in the Brief in Opposition filed by Respondents City of Winston-Salem, N.C., et al., merit this brief Reply.

1. Respondents assert that the broad language of Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), forecloses attacks on municipal annexations under the Fourteenth Amendment's due process clause. Brief in Opposition at 11. Petitioners agree that Hunter has been so construed, as in the case before this Court, but contend that this is the very reason why the writ of certiorari should be granted. Petitioners assert that the Hunter dictum is no longer sound precedent because the principles underlying Fourteenth Amendment adjudication have changed since Hunter was decided in 1907; that due process, contrary to Hunter, prohibits arbitrary annexations; and that this case is thus appropriate for review.

2. Respondents state that petitioners are "incorrect" in their contention that the North Carolina courts cannot review municipal annexations for unconstitutional arbitrariness. Brief in Opposition at 21. Respondents are in error. It is true that the North Carolina state courts have examined the constitutionality of the North Carolina annexation statute itself. See, e.g., Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980). But those courts cannot and will not examine whether conduct taken to effect an annexation is arbitrary and capricious, as principles of due process require.

As respondents have admitted, the definitive decision as to the scope of review of annexation proceedings is the

North Carolina Supreme Court's opinion in In re Annexation Ordinance, 303 N.C. 220, 229, 278 S.E.2d 224, 230 (1981), which held that no "separate test of 'reasonableness' [is found] within the limited scope of judicial review permitted in annexation cases." See Petition at 5-7, 32-33. Indeed, respondents' present argument is diametrically contrary to their assertions in the North Carolina state courts that judicial review of annexations is limited -- precisely as petitioners here contend -- to the matters specifically enumerated in N.C. Gen. Stat. § 160A-50(a)-(f), and that all other issues are irrelevant. These assertions are found in respondents' pleadings lodged with the Fourth Circuit in this case. See, e.g., Motion in

Limine, filed in Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., No. 82-CUS-4481 (Super. Ct. N.C.). Respondents' convenient turnabout here should not obscure the unconstitutionally narrow scope of review allowed by the statute.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition, this Court should grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert L. Deitz
Susan A. Cobb

GINSBURG, FELDMAN AND BRESS,
Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners

(Other counsel listed on next page)

November 18, 1983

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, N.C. 27106

Attorney for Petitioners Baldwin and Brewer, et al.

F. Lee Weaver
Weaver & Bennett, P.A.
P.O. Box B-925
Matthews, N.C. 28105

Attorney for Petitioners Raintree Homeowners Association, Inc., et al.

Hugh G. Casey, Jr.
Casey & Bishop, P.A.
700 Law Building
Charlotte, N.C. 28202

Attorney for Petitioners Derrick, et al.

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Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

MOTION OF NORTH CAROLINA FARM BUREAU FEDERATION, INC., *ET AL.*, FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF NORTH CAROLINA FARM BUREAU FEDERATION, INC., *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Eugene Gressman
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

Attorney for Amici Curiae North Carolina Farm Bureau Federation, Inc., et al.

November 10, 1983

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

No. 83-572

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Motion of North Carolina Farm Bureau Federation, Inc., et al., for Leave to File Brief Amici Curiae

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The North Carolina Farm Bureau Federation, Inc., et all/ move this Court

---

1/ The organizations filing this Motion as amici curiae are: North

[Footnote continued]

for leave to file the attached brief amici curiae pursuant to Rule 36.1 of

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[Continued from previous page]

Carolina Farm Bureau Federation, Inc.; North Carolina State Grange; Winston-Salem Chapter of NAACP; Citizens Opposed to Annexation by Valdese; Forsyth Citizens Opposing Annexation, Inc. -- Chapter II; Franchised Garbage Collectors of Forsyth County; Shasta Lane Citizens Opposing Annexation; North Albemarle Community Association; Rural Gilford TEA Party; Opponents of Forced Annexation, Inc.; New Hanover Right to Vote Association; Crowfield Condominium Association; Western Carolina Industries, Inc.; Ballentree Homeowners Association, Inc.; South Side Shopping Center; Skyline Sanitary Service; Save Our Suburbs; N.C. League of Concerned Citizens; Concerned Citizens Against Involuntary Annexation; Citizens For Fair Growth; Gaston County Taxpayers Association; Burke County Property Owners and Taxpayers Association; Little Yellow Mountain Property Owners Association; People of Oak Hill Against Forced Annexation; Cumberland County Fire Chiefs Association; Opponents of Forced Annexation.

the Rules of the Court. (Respondents City of Winston-Salem, N.C., et al., have refused to consent to the filing of a brief amici curiae.) Amici organizations represent or serve more than 460,000 North Carolina citizens who live, work, or own property in areas recently annexed, currently being annexed, or threatened with annexation by North Carolina cities, or who otherwise are or would be affected by such annexations.

These organizations and the persons they represent and serve, which are described in Appendix A, support the petition for writ of certiorari because the judicial review provision of the North Carolina annexation statute -- N.C. Gen. Stat. § 160A-50, found at Appendix F of the petition for writ of

certiorari -- prohibits amici from raising significant federal constitutional issues in North Carolina state court proceedings challenging annexations. For example, persons represented by amicus North Carolina Farm Bureau Federation, Inc., cannot assert in North Carolina state courts that annexations that arbitrarily engulf vast amounts of farm land undeveloped for urban purposes are unconstitutional under the due process clause of the Fourteenth Amendment. Moreover, members of amicus Winston-Salem Chapter of NAACP may not attack an annexation in a North Carolina state court for being motivated by a racially discriminatory purpose. In addition, under the opinion of the Court of Appeals for the Fourth Circuit in the case before this Court, persons

cannot challenge an annexation in federal court on the ground that it is arbitrary and capricious and thus unconstitutional. North Carolina citizens, including those amici represent, are thus left to oppose state annexations stripped of the ability to raise fundamental constitutional issues.

As demonstrated by the number of amici supporting the petition for writ of certiorari, there is widespread concern over North Carolina's unconstitutional procedure for reviewing annexations. This Court should grant amici's request to file the attached brief to allow them to express their concern and to explain why fundamental constitutional doctrine requires that

the petition for writ of certiorari be issued.

Respectfully submitted,

Eugene Gressman
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

Attorney for Amici Curiae
North Carolina Farm
Bureau Federation, Inc.,
et al.

November 10, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court limit the broad dicta in Hunter v. City of Pittsburgh, which the Fourth Circuit construed to effectively make the due process clause of the Fourteenth Amendment inapplicable to municipal annexations?

2. Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit annexations by municipalities that are arbitrary and capricious?

3. Does the judicial review provision of the North Carolina annexation statute violate the due process clause on its face and as applied to the annexations before the Court because this provision does not allow state court review of significant

constitutional issues -- e.g., whether an annexation is arbitrary and capricious?

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Brief of North Carolina Farm Bureau Federation, Inc., et al., As Amici Curiae in Support of Petition for Writ of Certiorari

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INTEREST OF AMICI CURIAE

The interest of the North Carolina Farm Bureau Federation, Inc., et al., as amici curiae is set forth in the Motion

for Leave to File Brief Amici Curiae, pp. i-vi, supra.

REASONS FOR GRANTING THE WRIT

1. The Lower Courts Ruling That The Due Process Clause Of The Fourteenth Amendment Does Not Prohibit Arbitrary And Capricious Annexations Presents An Important Constitutional Question.

Before the Court are rulings in four cases challenging annexations by Winston-Salem or Charlotte, North Carolina. Plaintiffs alleged facts demonstrating that the annexations are arbitrary, capricious, unreasonable, and an abuse of discretion, and thus violate the Fourteenth Amendment's due process clause for some or all of the following reasons:

(1) Annexation boundaries arbitrarily have been gerrymandered (a) to

include valuable industrial property or huge amounts of agricultural land or other property not developed for urban purposes, whose annexation standing alone was impermissible, (b) to exclude other areas needing city services that have lower tax bases or would be more expensive to service (in one instance creating a virtual island of unincorporated land within a city), (c) to exclude tracts that qualify for annexation much closer to the city center than areas annexed, and (d) to exclude areas that are integral parts of the areas annexed.

(2) The annexations bring into the city areas with services superior to those the city provides, which did not need city services.

(3) They were motivated solely or primarily by a desire to increase the city's tax revenues or revenue-sharing funds.

(4) There has been an attempt to annex territory that, if it belongs in any municipality, should be in another one.2/

Moreover, plaintiffs alleged that, under the judicial review provision of the North Carolina annexation statute, N.C. Gen. Stat. § 160A-50, the annexations could not be subjected to the judicial review required by the due process clause because fundamental

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2/ Comparison of the complaints with the Fourth Circuit's opinion will demonstrate that the Court of Appeals mischaracterizes plaintiffs' allegations in these regards.

constitutional questions -- i.e., whether defendants' actions were arbitrary and thus offended due process principles -- could not be examined by the state courts.

All plaintiffs moved for partial summary judgment on this latter claim, setting forth supporting material facts that essentially were undisputed. In each case, the district court denied plaintiffs' motion for partial summary judgment and dismissed the suit. Relying on Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), the district courts ruled that Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), "foreclose[d]" attacks on municipal annexations under the due process clause and that plaintiffs thus had failed to state a claim upon which relief can be granted.

Baldwin v. City of Winston-Salem, 544 F. Supp. 123, 124 (M.D.N.C. 1982); Raintree Homeowners Ass'n v. City of Charlotte, 543 F.Supp. 625, 627-28 (W.D.N.C. 1982); Brewer v. City of Winston-Salem, (unreported); Appendix D to petition for certiorari (hereinafter "Cert. App. __").3/

The Court of Appeals for the Fourth Circuit affirmed these rulings, relying mainly on Hunter. Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.

3/ The district courts made no factual findings that the annexations at issue were not arbitrary and capricious. Nor did they conclude that the allegations were insufficient to allege arbitrary annexations. Such a finding would have been impermissible for numerous state cases have found arbitrary conduct in situations quite similar to those at bar. See, e.g., cases cited infra pp. 10-11, 29.

1983); Cert. App. A. After recognizing that the Fourteenth Amendment prohibits annexations that discriminate on racial grounds or against a class of voters, the court said:

> We think it plain . . . that the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications.

710 F.2d at 135; Cert. App. A, 14a-15a.

Finding "[n]o ... fundamental right ... implicated" in this case, the court said:

> Given our conclusion that the Fourteenth Amendment is not violated where, as here, the proposed annexation does not impinge on fundamental rights or create suspect classifications, there is no right under the Fourteenth Amendment to

> challenge annexation decisions alleged merely to be arbitrary and capricious. There is, accordingly, no federal right to have state courts hear such challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law.

710 F.2d at 135 n.3 (emphasis added); Cert. App. A, 16a n.4.

The conclusion that the due process clause of the Fourteenth Amendment does not prohibit arbitrary and capricious annexations is wholly at odds with basic constitutional doctrine announced by this Court. It is commonplace law that the Fourteenth Amendment prohibits arbitrary state action, whether or not the right involved is considered to be "fundamental." See Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); Wolff v. McDonnell, 418 U.S. 539, 558 (1974);

Slochower v. Board of Higher Education of New York, 350 U.S. 551 (1956); Nebbia v. New York, 291 U.S. 502 (1934). In Slochower, 350 U.S. at 559, the Court recognized that Mr. Justice Cardozo had viewed "the 'protection of the individual against arbitrary action' . . . as the very essence of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 [1937]."4/

Moreover, "the right to due process reflects a fundamental value in our American Constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374 (1971). The Fourth Circuit's conclusion

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4/ In Wolff v. McDonnell, 418 U.S. at 558, this Court said that "[t]he touchstone of due process is protection of the individual against arbitrary action of government. . . ."

that there is no "fundamental" due process right to be free from arbitrary conduct simply is not tenable.

It is no answer to say that the due process clause applies only to matters other than annexations. This Court repeatedly has affirmed that both the due process and the equal protection clauses apply to "every" state action, including actions by municipalities. E.g., Plyler v. Doe, 451 U.S. 968 (1982); Avery v. Midland County, 390 U.S. 474, 480 (1968).5/

5/ See also Columbus Board of Education v. Penick, 443 U.S. 449, 457 n.5 (1979); Milliken v. Bradley, 418 U.S. 717, 744 (1974); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919) (Brandeis, J.). More specifically, several federal cases -- Moorman v. Wood, 504 F. Supp. 467, 473, 477 (E.D. Ky. 1980); Doyle v. Municipal

[Footnote continued]

The out-dated case of Hunter v.

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Commission of Minnesota, 340 F. Supp. 841, 844 (D. Minn.), aff'd, 468 F.2d 620 (8th Cir. 1972); and Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1405 (D. Colo.), aff'd, 399 U.S. 901 (1970) -- expressly state that annexations and annexation procedures are governed by due process principles and that arbitrary annexations run afoul of the Fourteenth Amendment.

Various authoritative, well-reasoned state cases also have held that an arbitrary annexation violates the due process clause of the Fourteenth Amendment. See Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366, 368 (1947) ("an annexation which is arbitrary, unreasonable, unjust and unnecessary will be held invalid"); Texas ex rel. Walker v. City of Gladewater, 139 S.W.2d 283, 286 (Tex. Civ. App. 1940) (attempted annexation was "arbitrary, unreasonable and violative of the inhibitions of [the] Federal Constitution . . . amend. 14."); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129, 1135 (1952); Florida ex rel. Davis v. City of Stuart, 97 Fla. 283, 120 So. 335, 345 (1929).

City of Pittsburgh, 207 U.S. 161 (1907), upon which the Fourth Circuit principally relied, no longer mandates the conclusion that the due process clause does not prohibit an arbitrary annexation. Hunter actually adjudicated a rather narrow issue: whether the citizens of one municipality may defeat by their vote annexation by another municipality. However, the Hunter Court, in dicta, broadly declared that annexation by a city or town is purely a state political matter, entirely within the power of the state legislature to regulate, and that a state "at its pleasure" without constitutional restraints could alter municipal boundaries. 207 U.S. at 178-79. It was those dicta that the Fourth Circuit elevated into a constitutional principle.

This Court recognized in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978), that -- while Hunter remains significant in emphasizing the considerable latitude that states have in structuring their political subdivisions -- "the broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases" such as Kramer v. Union Free School District, 395 U.S. 621 (1969) (emphasis added).6/

Another case restricting Hunter is Gomillion v. Lightfoot, 364 U.S. 339 (1960), which declares that a municipal

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6/ Kramer held that the Fourteenth Amendment's equal protection clause prohibits discrimination where voting rights are concerned.

boundary change "lies within the scope of relevant limitations imposed by the United States Constitution." 364 U.S. at 344-45. This case, which invalidated discriminatory boundary adjustments in Tuskegee, Alabama, was decided under the Fifteenth, not the Fourteenth, Amendment. Nonetheless, numerous courts, including this Court, have recognized that Gomillion's broad language pertains to constitutional limitations found in the Fourteenth Amendment. See, e.g., Reynolds v. Sims, 377 U.S. 533, 566 (1964); Hayward v. Clay, 573 F.2d 187, 190 (4th Cir.), cert. denied, 439 U.S. 959 (1978); Garren v. City of Winston-Salem, 463 F.2d 54, 56 (4th Cir. 1972); Doyle v. Municipal Commission of Minnesota, 340 F. Supp. 841, 843 (D. Minn.), aff'd, 468 F.2d 620 (8th Cir.

1972); Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1400-01 (D. Colo.), aff'd, 399 U.S. 901 (1970); City of Birmingham v. Community Fire District, 336 So. 2d 502, 507 (Ala. 1976). That Hunter's sweeping dicta no longer constitute good law is established in great detail in the petition for certiorari in the present case (pp. 13-32).

In sum, the Fourth Circuit's conclusion that the due process clause does not prevent arbitrary municipal annexations is contrary to extant constitutional law set forth in "modern" decisions of the Court. Moreover, the Fourth Circuit's decision conflicts with decisions in other circuits that plainly recognize that an arbitrary, capricious annexation violates the due process

clause. See supra note 5, at 10-11. For these reasons the petition for certiorari should be granted.

2. The North Carolina Annexation Statute Prohibiting Review of Allegedly Unconstitutional Conduct Raises Major Due Process Questions.

The Fourth Circuit declined to hold that the North Carolina annexation statute unconstitutionally restricts judicial review. This action also disregarded basic constitutional law recognized by this Court, and thus the petition for certiorari should be granted on that issue.

In various recent decisions, the North Carolina Supreme Court has held that, under N.C. Gen. Stat. § 160A-50(f), state courts may review an annexation to determine only if certain easily adhered to statutory requirements

are met.7/ Under these opinions, however, state courts may not separately examine an annexation to determine if it is arbitrary and unreasonable, and thus unconstitutional.

Most prominent in this regard is In Re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), which involved annexations by Winston-Salem before this Court. In the state case the plaintiffs (who are not before this Court) presented evidence demonstrating that the annexations were arbitrary, unreasonable and improperly motivated. The

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7/ Section 160A-50(f) provides the only means to challenge annexations in the North Carolina state courts. E.g., Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980); Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967).

Superior Court, however, declined to consider such evidence and excluded similar evidence.

The North Carolina Supreme Court affirmed the lower court, stating:

> The superior court's review of the annexation ordinance of a municipal governing body is limited by statute. Upon review the judge may examine the annexation proceedings to determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes . . . .
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> G.S. 160A-50(f) provides in effect that on judicial review the court may hear oral arguments, receive written briefs, and may take evidence intended to show,
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> (1) that the statutory procedure was not followed, or
>
> (2) that the provisions of G.S. 160A-47 [concerning required documents and plans for city services] were not met, or

> (3) that the provisions of G.S. 160A-48 [concerning whether an area meets very flexible criteria regarding, e.g., population density, lot size and contiguousness] have not been met.
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> This section clearly specifies the inquiries to which the court is limited.

278 S.E.2d at 230-31 (emphasis added).

The court concluded that state courts could not separately examine the "reasonableness" of an annexation. 278 S.E.2d at 231. And it said:

> The legislature has the right, unhampered by constitutional restrictions, to grant the power given in the annexation statute under consideration to municipalities having a population of five thousand or more since the power is incidental to municipal government in matters of purely local concern.

278 S.E.2d at 228 (emphasis added).8/

8/ The provision specifying a state court's options if it finds an

[Footnote continued]

To the same effect are Food Town Stores v. City of Salisbury, 300 N.C.

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annexation faulty -- N.C. Gen. Stat. 160A-50(g) -- is also significant. Under this provision, a court may only:

(1) Remand so that proper procedures can be followed, if petitioners were "materially injured" by the failure to do so;

(2) Remand for amendment of annexation boundaries to adhere to the statutory provision specifying the nature of the area that can be annexed; or

(3) Remand for amendment of the plans for provision of city services to meet statutory standards.

Invalidation of an annexation because it is arbitrary or unreasonable is not allowed by this provision. As In Re Annexation Ordinance illustrates, North Carolina courts have considered whether the annexation statute is constitutional, but they will not review the conduct of city officials to determine whether they have acted unconstitutionally. See 278 S.E.2d at 229-32.

21, 265 S.E.2d 123 (1980), Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265, 268 (1980), and Humphries v. City of Jacksonville, 300 N.C. 186, 265 S.E.2d 189, 190 (1980). Moreover, in the two Charlotte cases before this Court, the district court agreed that, under the North Carolina statute, state petitioners may argue only that the statutory criteria have not been met, but may not separately contend that an annexation is arbitrary and thus unconstitutional. See Cert. App. C.

The result of the North Carolina Supreme Court decisions is that, for example, the following unconstitutional actions totally escape judicial scrutiny in North Carolina state courts:

a. An arbitrary gerrymandering of annexation borders, solely to

gain tax revenues, to include large amounts of agricultural land that are not developed for urban purposes and need no city services.

b. An arbitrary attempt to annex an area to dilute a city's black vote and thus retain political power for white incumbents.

c. Abusive conduct by authorities who accept bribes to vote for an annexation.

It is well-settled, however, that the due process clause of the Fourteenth Amendment requires that parties allegedly injured by unconstitutional state conduct be given access to the state courts, that those courts pass judgment on this conduct, and that they give redress to persons injured by such actions. This proposition is

established, for example, by Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). There a state utility commission, finding that a water company's rates were unreasonably high, reduced them. The Pennsylvania Supreme Court upheld the commission's action, but on appeal this Court reversed.

The Court first decided that the state Supreme Court had interpreted the rate setting statute to preclude judicial review of the constitutional question involved: "[W]e are compelled to conclude that the [Pennsylvania] Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal." 253 U.S. at 289.

The Court then held that a denial of the opportunity for review of constitutional questions was itself a denial of due process of law: "[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." Id. Reversal was required because "[t]hus far [the water company] has not succeeded in obtaining the review . . . which the Fourteenth Amendment requires the state to provide." Id.

In St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49-54

(1936), which involved a Department of Agriculture rate order, the Court recognized a Fifth Amendment due process right to judicial review of constitutional questions arising in federal administrative proceedings. In a well-known concurring passage, Justice Brandeis said: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84. See also Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418

(1890) (state statute prohibiting judicial review of railroad rates set by commission denied due process of law); Hurtado v. California, 110 U.S. 516, 534-35 (1884).9/

Also pertinent are the various federal decisions that have construed administrative statutes to allow judicial review to avoid the constitutional question that failure to provide review would raise.10/ For example, in Johnson v. Robison, 415 U.S. 361 (1974), where the constitutionality of a veterans benefit statute was challenged, the government contended that judicial review was barred by a provision

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9/ Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982).

10/ See Crowell v. Benson, 285 U.S. 22, 62 (1932).

purporting to render all administrative decisions final and unreviewable. Noting that a construction foreclosing constitutional challenges to the act would "raise serious questions concerning the constitutionality" of that statute, this Court read the statute to permit judicial review of such claims. 415 U.S. at 366. See also Ralpho v. Bell, 569 F.2d 607, 618-22 (D.C. Cir. 1977) (Micronesian Claims Act interpreted to allow judicial review of Claims Commission rulings allegedly offending due process to avoid constitutional question that denial of review would present);11/ Ungar v. Smith, 667

11/ The court said: "If the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function." 569 F.2d at 620.

F.2d 188, 193 (D.C. Cir. 1981) (statute interpreted to allow judicial review of claims that Department of Justice violated due process in order not "to court the constitutional dangers inherent in denying a forum" in which to challenge department's actions).12/

Not surprisingly, even where no statute provided for review, various

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12/ State courts have also held that review of allegedly arbitrary administrative action is constitutionally required. See Kendall v. Beiling, 245 Ky. 782, 783, 175 S.W. 2d 489, 491 (1943); Butterworth v. Boyd, 12 Cal. 2d 140, 144, 82 P.2d 434, 439 (1938); American Beauty Homes Corp. v. Louisville, 379 S.W.2d 450, 456-57 (Ky. 1964); State v. Northern Pac. Ry. Co., 229 Minn. 312, 39 N.W.2d 752 (1949). These decisions at times rest on state constitutional provisions rather than on the Fourteenth Amendment, but nonetheless speak persuasively to the dictates of due process.

state courts have felt compelled to examine annexations alleged to be arbitrary and thus contrary to due process. See Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366, 368 (1947); Texas ex rel. Walker v. City of Gladewater, 139 S.W.2d 283, 286 (Tex. Civ. App. 1940); Florida ex rel. Davis v. City of Stuart, 97 Fla. 283, 120 So. 335, 345 (1929); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129, 1135 (1952); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235, 242 (1949).13/

13/ See also as to the judicial review required in deannexation proceedings, Kel-Kan Investment Corp. v. Village of Greenwood, 393 So. 2d 818, 820-21 (La. Ct. App. 1981); West Point Island Civic Ass'n v. Township Committee, 54 N.J. 339, 255 A.2d 237, 240-41 (1969).

Unlike courts that have been able to construe statutes to permit judicial review, this Court is unable through statutory construction to avoid the constitutional question. As has been admitted by defendants, the North Carolina Supreme Court's definitive interpretation of N.C. Gen. Stat. § 160A-50(f) is binding on the federal courts. This Court thus should allow the petition for certiorari and apply the uncontestable principle that a state statute interpreted by a state's highest court to deny judicial review of constitutional claims is itself unconstitutional.14/

14/ Because courts in other states will review allegations of unconstitutional conduct in annexation proceedings, the principal result of a ruling for petitioners in this case would be to force North Carolina

[Footnote continued]

CONCLUSION

For the reasons presented, the petition for certiorari should be granted as to both issues presented in this case.

Respectfully submitted,

Eugene Gressman
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

Attorney for Amici Curiae North Carolina Farm Bureau Federation, Inc., et al.

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courts similarly to hear constitutional questions. A ruling for petitioners here thus would not provoke more federal litigation, but would only compel North Carolina courts to act in constitutional fashion.

APPENDIX A
DESCRIPTION OF AMICI CURIAE[1]

1. North Carolina Farm Bureau Federation, Inc.

This organization, the largest agricultural organization in North Carolina, represents more than 224,000 farm family members (including at least 400,000 persons). It was formed in 1936 and has a chapter in each county in North Carolina. It opposes annexation of farm land for arbitrary reasons, such as where a city annexes for no purpose other than to increase its tax revenues.

2. North Carolina State Grange

This organization has 10,000 North Carolina citizens as members. It opposes annexation of farm lands for arbitrary reasons.

1/ All municipalities referenced are North Carolina municipalities.

3. Winston-Salem Chapter of NAACP

This organization, which has 4,000 North Carolina citizens as members, generally opposes annexations that focus on predominantly white areas and thus dilute the effectiveness of the votes of black city residents.

4. Citizens Opposed to Annexation by Valdese

This group represents 900 residents in the Valdese area whose properties were either annexed in 1982 or now are under threat of imminent annexation by that municipality.

5. Forsyth Citizens Opposing Annexation, Inc. -- Chapter II

This group represents 9,748 citizens living near Winston-Salem. It opposes an August 1, 1983 decision by the city's Board of Aldermen to annex six additional areas adjacent to that city.

6. Franchised Garbage Collectors of Forsyth County

This organization serves 18,000 citizens and opposes consummated or threatened annexations by Winston-Salem (including those objected to by the Forsyth Citizens group) that have caused or likely will cause severe economic hardship to privately-owned garbage collecting services operating in county areas.

7. Shasta Lane Citizens Opposing Annexation

This group represents 25 citizens living in an area annexed by Hudson, which for several years has failed to provide services to the annexed area, but nonetheless seeks to impose city taxes on area residents for the entire period since the annexation became effective.

8. North Albemarle Community Association

This group represents 700 citizens whose property was recently annexed by Albemarle.

9. Rural Gilford TEA Party

This group represents 3,200 citizens living in areas annexed by High Point in June 1983.

10. Opponents of Forced Annexation, Inc.

Some 15,000 citizens are represented by this group that was formed as a result of Greensboro's 1981 attempt to annex this area. This matter is still in litigation in state courts.

11. New Hanover Right to Vote Association

Eight thousand citizens are represented by this group, which was formed in 1977 to oppose annexation attempts by Wilmington. The annexations involved

are now being challenged in state courts.

12. Crowfields Condominium Association
Western Carolina Industries, Inc.
Ballentree Homeowners Association, Inc.
South Side Shopping Center
Skyline Sanitary Service

These entities, which together represent and serve some 1,350 citizens, oppose recent annexations by Ashville. The Skyline Sanitary Service may be forced out of business by the city's actions.

13. Save Our Suburbs

This organization represents 133 citizens and opposes a threatened annexation by Tryon.

14. N.C. League of Concerned Citizens

This group represents 300 citizens and opposes a recently consummated annexation and an attempted annexation by Newton.

15. Concerned Citizens Against Involuntary Annexation

This group represents some 150 citizens whose property was annexed by Conover in June, 1982.

16. Citizens For Fair Growth

This organization represents 690 citizens and opposes an annexation by Salisbury that is being challenged in state courts.

17. Gaston County Taxpayers Association

This group, which has 3,000 members who are residents of Gaston County, opposes forced annexations. It coordinates the efforts of and educates North Carolina citizens -- particularly those in Gaston County -- who desire to prevent unwanted annexations.

18. Burke County Property Owners and Taxpayers Association

Six hundred citizens are members of this group, which is associated with the Gaston County Taxpayers Association and opposes annexations in Burke County.

19. Little Yellow Mountain Property Owners Association

This group represents 100 citizens and opposes a recent annexation by the Highlands effected after lengthy litigation.

20. People of Oak Hill Against Forced Annexation

This group represents 1,940 citizens from a community near Morgantown, which apparently intends to annex the community within the next several years.

21. Cumberland County Fire Chiefs Association

This group has some 800 members from Cumberland County, where

municipalities are preparing for annexations. Volunteer fire departments in the county are concerned that annexations will force them out of existence.

22. Opponents of Forced Annexation

This group has 500 members who are citizens of areas adjacent to Mebane, which the city decided to annex in January 1983. This matter is now pending in North Carolina superior court.